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SRI SANJEEVAN RAMAKRISHNAN v. ASP POONNAM E KELING & ORS

FEDERAL COURT, PUTRAJAYA
HARMINDAR SINGH DHALIWAL FCJ
AB KARIM AB JALIL FCJ
B VAZEER ALAM MYDIN MEERA FCJ
[CIVIL APPEAL NO: 01(F)-4-02-2024(W)]
7 APRIL 2025

Abstract – *The granting of a habeas corpus order simply means that a detention is found to be unlawful for the purposes of immediate release. The fact that a habeas corpus order is issued, however, does not automatically translate to liability for false imprisonment. In order to claim damages for unlawful detention, through the tort of false imprisonment, one must still prove the elements of that specific tort in a separate civil suit.*

CRIMINAL PROCEDURE: *Habeas corpus – Remand – Wrong and unlawful detention – Applicant obtained writ of habeas corpus and released – Claim for tort of false imprisonment – Whether issuance of habeas corpus order automatically translated to liability for false imprisonment – Prevention of Crime Act 1959, s. 3*

TORT: *False imprisonment – Damages – Claim – Applicant successful in application for writ of habeas corpus and immediately released – Claim for tort of false imprisonment – Whether issuance of habeas corpus order automatically translated to liability for false imprisonment – Federal Constitution, arts. 5(1) & (2)*

The appellant was arrested, pursuant to s. 3 of the Prevention of Crime Act 1959, and was placed under remand for a period of 21 days and detention. Whilst in detention, the appellant successfully obtained a writ of *habeas corpus*, resulting in his immediate release. Following the said decision, the appellant filed an action at the High Court, against the respondents, premised upon the tort of false imprisonment. In the said action, the appellant sought: (i) declarations that his detention was wrong and unlawful and his right under art. 5 of the Federal Constitution ('FC') had been violated; and (ii) general, aggravated and exemplary damages. The High Court allowed the claim. The respondents appealed to the Court of Appeal and the appeal was allowed; the decision of the High Court was set aside. Hence, the present appeal. The primary question that arose for adjudication was, where an order issuing the writ of *habeas corpus* is made in relation to the remand of a person, is it a necessary implication of such order that the detention was not effected in accordance with law, under art. 5(2) of the FC, and was thus unlawful for contravening art. 5(1) of the FC and amounting to false imprisonment.

Held (dismissing appeal; affirming decision of Court of Appeal)
Per Vazeer Alam Mydin Meera FCJ delivering the judgment of the court:

(1) The detenu who claims to have been unlawfully detained and is successful in a claim for *habeas corpus* will have to mount a separate action, in tort, for damages or monetary compensation. The success of a *habeas corpus* application would not necessarily form the basis of the civil action for damages. Whilst the order of *habeas corpus* is strong evidence in favour of the plaintiff, it is not conclusive to establish the case for false imprisonment. The fact that a *habeas corpus* order was issued did not automatically translate to liability for false imprisonment. (paras 41 & 44)

(2) The tort of false imprisonment is not one of strict liability that necessarily flows from an order of *habeas corpus*. There are two different processes under the law, *ie*, *habeas corpus* falls under criminal law while the tort of false imprisonment falls under civil law. While both deal with the lawfulness of detention, between both, there are different constituent elements that must first be established and different remedies that may be granted. The success of one does not invariably lead to the success of the other. (para 46)

(3) The appellant's detention was based on the Magistrate's detention warrant. The detention was not made in the absence of a lawful judicial order or in excess of jurisdiction. The first respondent was merely executing the judicial order contained in the Magistrate's detention warrant. The application for *habeas corpus* was allowed on a technicality, *ie*, the place of detention stated in the detention warrant was not a gazetted place of detention. That mistake could not be attributed to the first respondent. Therefore, the first respondent could not be held liable in an action for false imprisonment, nor would the second and third respondents be vicariously liable. (para 52)

Bahasa Melayu *Headnotes*

Perayu ditangkap, bawah s. 3 Akta Pencegahan Jenayah 1959, dan diletakkan bawah reman untuk tempoh 21 hari dan penahanan. Semasa dalam tahanan, perayu berjaya memperoleh writ *habeas corpus*, lalu dilepaskan serta merta. Ekoran keputusan tersebut, perayu memulakan satu tindakan di Mahkamah Tinggi, terhadap responden-responden, berpaksikan pada tort penahanan salah. Dalam tindakan tersebut, perayu memohon: (i) deklarasi bahawa penahanannya adalah salah dah tidak sah bawah undang-undang dan haknya bawah per. 5 Perlembagaan Persekutuan ('PP') telah dicabuli; dan (ii) ganti rugi am, teruk dan teladan. Mahkamah Tinggi membenarkan tuntutan tersebut. Responden-responden merayu di Mahkamah Rayuan dan rayuan mereka dibenarkan; keputusan Mahkamah Tinggi diketepikan. Maka terbit rayuan ini. Soalan utama yang timbul untuk diputuskan adalah, apabila satu perintah writ *habeas corpus* dibuat

bersangkutan reman seseorang, adakah perintah tersebut mempunyai implikasi wajib bahawa penahanan yang dibuat tidak selaras dengan undang-undang, bawah per. 5(2) PP, dan, berikutan itu, tidak sah kerana bercanggah dengan per. 5(1) PP dan terjumlah sebagai penahanan salah.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Rayuan)

Oleh Vazeer Alam Mydin Meera HMP menyampaikan penghakiman mahkamah:

(1) Tahanan yang mendakwa dirinya ditahan secara salah dan berjaya dalam tuntutannya untuk *habeas corpus* perlu memulakan tindakan berasingan, bawah tort, demi memperoleh ganti rugi atau pampasan berunsur kewangan. Kejayaan permohonan *habeas corpus* tidak semestinya akan membentuk asas tindakan sivil untuk ganti rugi. Walaupun perintah *habeas corpus* adalah keterangan kukuh yang berpihak pada plaintif, ini bukanlah muktamad dalam membuktikan kes penahanan salah. Fakta bahawa perintah *habeas corpus* dikeluarkan tidak, secara automatik, bermakna terdapat tanggungan untuk penahanan salah.

(2) Tort penahanan salah bukan satu liabiliti ketat yang semestinya terhasil daripada perintah *habeas corpus*. Terdapat dua proses berbeza bawah undang-undang, iaitu, *habeas corpus* terangkum bawah undang-undang jenayah manakala tort penahanan salah terangkum bawah undang-undang sivil. Walaupun kedua-duanya berurusan dengan keesahan penahanan, antara kedua-duanya, terdapat elemen-elemen berbeza yang mesti dibuktikan terlebih dahulu dan remedi-remedi berbeza yang boleh diberikan. Kejayaan yang satu tidak membawa pada kejayaan yang satu lagi.

(3) Penahanan perayu dibuat berdasarkan waran tahanan yang dikeluarkan oleh Majistret. Penahanan tersebut tidak dibuat dalam ketiadaan perintah kehakiman yang sah atau melangkaui bidang kuasa. Responden pertama sekadar melaksanakan perintah kehakiman yang terkandung dalam waran tahanan Majistret. Permohonan *habeas corpus* dibenarkan atas sebab teknikal, iaitu, tempat penahanan yang tercatat dalam waran tahanan tidak diwartakan sebagai tempat penahanan. Kesilapan ini tidak boleh dikaitkan dengan responden pertama. Oleh itu, responden pertama tidak boleh dikatakan bertanggungan dalam tindakan untuk penahanan salah, dan responden kedua dan ketiga juga tidak bertanggungan secara vikarius.

Case(s) referred to:

Abillah Labo Khan v. PP [2002] 3 CLJ 521 CA ***(refd)***

Aminah Ahmad v. The Government Of Malaysia & Anor [2022] 2 CLJ 726 CA ***(refd)***

ASP Poonnam E Keling & Ors v. Sri Sanjeevan Ramakrishnan [2023] 10 CLJ 1 CA ***(refd)***

Austin v. Dowling [1870] LR 5 CP 534 ***(refd)***

Balakrishnan Subramaniam v. Penguasa Pusat Pemulihan Akhlak, Simpang Renggam, Johor Darul Takzim & Ors [2014] 2 CLJ 563 HC ***(refd)***
Coghlan v. Chief Constable Of Cheshire Police And Others [2018] EWHC 34 ***(refd)***
Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby [2014] 9 CLJ 15 CA ***(refd)***
Hassan Marsom & Ors v. Mohd Hady Ya'akop [2018] 7 CLJ 403 FC ***(refd)***
Lei Meng v. Inspektor Wayandiana Abdullah & Ors And Other Appeals [2022] 3 CLJ 177 FC ***(refd)***
Muhamad Mustaqim Jidin v. Mohd Zulfadhli Radzali & Ors [2017] CLJU 919; [2017] 1 LNS 919 HC ***(refd)***
National Westminster Bank Plc v. Spectrum Plus Ltd [2005] UKHL 41 ***(refd)***
Nivesh Nair Mohan v. Dato' Abdul Razak Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors [2021] 8 CLJ 163 FC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Sazali Mat Noh v. Timbalan Menteri Dalam Negeri, Malaysia [1998] 4 CLJ 460 HC ***(refd)***
Shahrudi Abidin v. Datuk Wira Abu Seman Yusop Timbalan Menteri Dalam Negeri Kementerian Dalam Negeri Malaysia & Ors [2021] 1 CLJ 52 CA ***(refd)***
Sri Sanjeevan Ramakrishnan v. ASP Poonnam E Keling & Ors [2022] CLJU 2577; [2022] 1 LNS 2577 HC ***(refd)***
Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals [2021] 5 CLJ 581 FC ***(refd)***
Zenati v. Commissioner Of Police Of The Metropolis And Another [2015] 2 WLR 1563 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 117, 365(a)(ii)
Federal Constitution, art. 5(1), (2)
Government Proceedings Act 1956, s. 5
Prevention of Crime Act 1959, ss. 3(1), 4(1)(a)

Other source(s) referred to:
Halsbury's Laws of England, 5th edn, vol 97, para 544
Salmond & Heuston, *Law of Torts,* 21st edn, pp 126-127

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[Editor's note: For the Court of Appeal judgment, please see ASP Poonnam E Keling & Ors v. Sri Sanjeevan Ramakrishnan [2023] 10 CLJ 1 (affirmed); For the High Court judgment, please see Sri Sanjeevan Ramakrishnan v. ASP Poonnam E Keling & Ors [2022] CLJU 2577; [2022] 1 LNS 2577 (overruled).]

Reported by Najib Tamby

A

JUDGMENT

Vazeer Alam Mydin Meera FCJ:

Introduction

B **[1]** The appellant had commenced an action for false imprisonment against the respondents. The High Court, after full trial, had entered judgment in favour of the appellant. On appeal to the Court of Appeal, that decision was reversed and the judgment set aside. This appeal is in respect of that decision of the Court of Appeal.

C **[2]** The Federal Court had on 20 February 2024 granted leave to the appellant on the following question of law:

> Where an order issuing the writ of *habeas corpus* is made in relation to the remand of a person, is it a necessary implication of such order that the detention was not effected in accordance with law under Article 5(2) of the Federal Constitution and was thus unlawful for contravening Article 5(1) of the Federal Constitution and amounting to false imprisonment.

D

Background Facts

Appellant's Arrest And Detention

E **[3]** On 10 July 2016, the first respondent arrested the appellant under s. 3 of the Prevention of Crime Act 1959 ("POCA").

[4] On 11 July 2016, the first respondent applied for a remand order under s. 4(1) of the POCA to the Magistrates' Court. A remand order for a period of 21 days, *ie*, 11 July 2016 to 31 July 2016, and a detention warrant dated 11 July 2016 were issued by the Magistrates' Court. The said warrant dated 11 July 2016 states as below:

F

> Kepada Pegawai yang menjaga Penjara di Police Remand Centre dalam Jalan Ipoh, KL
>
> ...

G

> Bahawasanya Sri Sanjeevan A/L Ramakrishnan K/P 841009-05-5689 (kemudian daripada ini disebut orang yang dituduh) telah dibawa pada hari ini ke hadapan Mahkamah ini dipertuduh melakukan kesalahan S4(1)(a) APJ dan adalah perlu ditahan orang yang dituduh itu. Ini adalah memberi kuasa dan menghendaki kamu pegawai yang tersebut menerima orang yang dituduh ini ke dalam jagaan kamu bersama waran ini dan mempenjarakannya dengan selamat dalam Penjara sehingga haribulan 31 Jul 2016 apabila kamu akan menyebabkannya supaya dibawa ke hadapan Mahkamah tersebut pada pukul (blank) pagi hari yang tersebut melainkan jika kamu diperintahkan selainnya buat sementara itu.

H

Writ Of Habeas Corpus

I **[5]** On 15 July 2016, whilst in detention, the appellant filed an application at the High Court for a writ of *habeas corpus*. The first respondent and second respondent were named as the respondents in the said application.

[6] On 26 July 2015, upon hearing the said application, the High Court in summary found as below:

(i) section 4(1)(a) of the POCA states that a Magistrate is to "... remand the person in police custody for a period of 21 days ...". By using the phrases "Kepada Pegawai Yang Menjaga Penjara ..." and "... dan mempenjarakannya dengan selamat dalam Penjara", the detention warrant dated 11 July 2016 clearly contradicted the wording used in s. 4(1)(a) of the POCA;

(ii) the detention warrant dated 11 July 2016 was issued to detain the appellant at the "Police Remand Centre, Jalan Ipoh, KL". However, the Police Remand Centre, Jalan Ipoh, KL was not a gazetted detention centre. The Federal counsel also failed to prove that the Police Remand Centre, Jalan Ipoh, KL stated in the detention warrant and the gazetted detention centre, *ie*, "Lokap di Pusat Tahanan Polis Mukim Batu, Kuala Lumpur" as per Government *Gazette* PU(B) 126/16 referred to the same place; and

(iii) the detention warrant dated 11 July 2016 stated that the appellant "dipertuduh melakukan kesalahan s. 4(1)(a) APJ dan adalah perlu ditahan orang yang dituduh itu ... dan mempenjarakannya ...". However, the appellant was arrested under s. 3(1) of the POCA for further investigation and no charges were levied against him. As such, the said warrant was confusing and prejudicial to the appellant.

[7] Based on the grounds above, the High Court was satisfied that the detention of the appellant through the detention warrant dated 11 July 2016 had contradicted the mandatory procedural requirement under s. 4(1)(a) of the POCA, which rendered the appellant's detention unlawful and void. The High Court, therefore, allowed the appellant's application, issued a writ of *habeas corpus* and ordered that the appellant be immediately released. (Paragraph 43 of the GOJ).

[8] The first and second respondents filed an appeal to the Federal Court against the High Court's decision but subsequently withdrew the said appeal.

High Court Action For Tort Of False Imprisonment

[9] Following the *habeas corpus* court's decision, the appellant filed an action in the High Court against the respondents. This action is the subject matter of the present appeal.

The Appellant's Claim – False Imprisonment

[10] The appellant's action against the respondents was for damages premised on the tort of false imprisonment for the period of wrongful and/or unlawful detention between 10 July 2016 and 26 July 2016 (16 days). The first respondent was named as the primary tortfeasor and the second and

A third respondents were alleged to be vicariously liable for the acts of the first respondent. The appellant also pleaded that he was physically abused/assaulted during the detention period.

[11] Hence, the appellant prayed for, *inter alia*, the following reliefs:

B (i) a declaration that the appellant's detention from 10 July 2016 to 26 July 2016 by the first respondent was wrong and unlawful;

(ii) a declaration that the appellant's right under art. 5 of the Federal Constitution was violated by the first respondent;

C (iii) general damages; and

(iv) aggravated and exemplary damages.

Findings Of The High Court

[12] The learned High Court Judge allowed the plaintiff/appellant's claim D for false imprisonment based on the following primary reasons:

(i) the High Court was bound to follow the *habeas corpus* court's decision, that the impugned Magistrate's detention warrant did not comply with the law. Consequently, the entire 16-day remand was unlawful.

E (ii) the High Court was also bound by the 2022 Federal Court decision in *Nivesh Nair Mohan v. Dato' Abdul Razak Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* [2021] 8 CLJ 163, the which held that s. 4 of POCA was unconstitutional. As a result, the plaintiff/appellant's remand under the detention warrant was automatically unconstitutional.

F (iii) since the defendants/respondents withdrew their appeal against the *habeas corpus* court's decision, this was deemed an admission by the respondents that the entire remand was unlawful. In coming to that decision, the learned High Court Judge relied on the *dicta* in the Court of Appeal case of *Shahrudi Abidin v. Datuk Wira Abu Seman Yusop Timbalan Menteri Dalam Negeri Kementerian Dalam Negeri Malaysia & Ors* G [2021] 1 CLJ 52, where Harmindar Singh Dhaliwal JCA (as he then was) held as follows:

> The respondents, by not appealing against the order made in the *habeas corpus* proceedings, must be taken to have accepted the findings of the court as correct and valid. In the circumstances, it was not open H to the respondents to suggest that the *habeas corpus* proceedings were irrelevant and could not be accepted as evidence.

(iv) the burden of proof rested on the defendants/respondents to demonstrate that the plaintiff/appellant was not physically abused during the 16-day remand and found that the appellant had suffered physical abuse in the I course of his detention. As such, the court surmised that this proves the claim of false imprisonment.

[13] The learned High Court Judge went on to conclude that as the appellant's detention since his arrest by the first respondent, *ie*, between 10 July 2016 to 26 July 2016, was unlawful, it follows that the appellant's detention during the said period had also contravened the appellant's rights under art. 5(1) of the Federal Constitution, as the appellant had been unlawfully deprived of his personal liberty.

[14] As to the liability of the second and third defendants/respondents, the learned High Court Judge had relied on s. 5 of the Government Proceedings Act 1956 and the case of *Muhamad Mustaqim Jidin v. Mohd Zulfadhli Radzali & Ors* [2017] CLJU 919; [2017] 1 LNS 919, and held that the second and third respondents were vicariously liable.

[15] Please see *Sri Sanjeevan Ramakrishnan v. ASP Poonnam E Keling & Ors* [2022] CLJU 2577; [2022] 1 LNS 2577; [2022] MLJU 2748 for the full judgment of the High Court.

Appeal To The Court Of Appeal

[16] The respondents lodged an appeal to the Court of Appeal against that decision of the High Court. The Court of Appeal unanimously allowed the respondents' appeal and set aside the judgment of the High Court on essentially the following grounds.

Retrospectively applying *Nivesh Nair*'s Case

[17] The Court of Appeal was of the opinion that by virtue of the doctrine of "prospective overruling", the High Court should not have relied on the Federal Court's ruling in *Nivesh* invalidating s. 4(1) of the POCA, and thus, held that the High Court Judge fell into error in applying the decision in *Nivesh* retrospectively to this case. The Federal Court in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393 said that the doctrine of prospective overruling was in appropriate cases a valuable judicial tool to mitigate the unfair or adverse consequences of retrospective application of a judicial decision invalidating any statutory law. Therefore, the Court of Appeal held that the learned High Court Judge had erred in relying on *Nivesh*'s case as binding precedent to allow the plaintiff's claim for false imprisonment. In coming to this decision, the Court of Appeal had referred to its earlier decision in *Abillah Labo Khan v. PP* [2002] 3 CLJ 521; [2002] 3 MLJ 298 on the application of the doctrine of prospective overruling in constitutional matters, where it was held as follows:

> In the United States, in respect of constitutional matters, that is to say, where a statute is declared unconstitutional, the power to declare such a ruling to be prospective only was asserted in 1965 in the case of *Linkletter v. Walker* (1965) 381 US 618 (at p 628). That principle has been adopted into our jurisprudence in *Public Prosecutor v. Dato' Yap Peng* [1987] 2 MLJ 311, where at pp 320-321, Abdoolcader SCJ said:

> ... The doctrine – to the effect that when a statute is held to be unconstitutional, after overruling a long standing current of decisions to the contrary, the court will not give retrospective effect to the declaration of unconstitutionally so as to set aside proceedings of convictions or acquittals which had taken place under that statute prior to the date of the judgment which declared it to be unconstitutional ...

[18] The House of Lords in the case of *National Westminster Bank Plc v. Spectrum Plus Ltd* [2005] UKHL 41 had also discussed the usefulness of the doctrine of prospective overruling in overcoming the "disruptive and seemingly unfair consequences" of the retrospective effect of a change in law following the court's declaration of unconstitutionality of any legislation, and held as follows:

> People generally conduct their affairs on the basis of what they understand the law to be. This 'retrospective' effect of a change in the law of this nature can have disruptive and seemingly unfair consequences. 'Prospective overruling', sometimes described as 'non-retroactive overruling', is a judicial tool fashioned to mitigate these adverse consequences. It is a shorthand description for court rulings on points of law which, to greater or lesser extent.

[19] Closer to home, the Court of Appeal in the case of *Aminah Ahmad v. The Government Of Malaysia & Anor* [2022] 2 CLJ 726; [2022] 4 MLJ 74 had reaffirmed the position that a judicial decision declaring a legislation to be unconstitutional can fall within the doctrine of prospective overruling and ought not to be applied retrospectively. In *Aminah,* the Court of Appeal held:

> It is a fundamental principle of adjudicative jurisprudence that all judgments of a court are retrospective in effect. However, the law has evolved to afford courts, in appropriate cases, with a discretion to mitigate foreseeable adverse consequences and hardship, especially if it would otherwise affect a class of the citizenry. This may sometimes be achieved by invoking the doctrine of 'prospective overruling'; a ruling that is to be effective only prospectively.
>
> ...
>
> 'Prospective overruling' is clearly an exception to the general rule ... In cases involving the avoidance of a law, which has stood for some time, for being in contravention of the Federal Constitution, the doctrine of prospective overruling would be available to give effect to the *raison d'etre* for its existence.

[20] Based on these precedents, the Court of Appeal in the present case was of the view that it was only just and fair to state that the ruling in *Nivesh*'s case does not retrospectively apply against the appellant's remand under s. 4(1) of the POCA, which took place more than five years before the Federal Court's finding of unconstitutionality in *Nivesh*. The Court of Appeal held that retrospective application of *Nivesh*'s case would be utterly chaotic

and problematic as it would then open the floodgates for any and all remands under the said provision to become the subject of a claim for false imprisonment despite the fact that the remand/detention orders were lawfully and constitutionally carried out during the time when the provision was still deemed lawful and constitutional. The Court of Appeal was of the view that it would be manifestly unjust to condemn the Magistrate years later for issuing the impugned Magistrate's detention warrant and the first respondent for holding the appellant under remand when they had only done so in reliance of the provision of law which was still lawful and constitutional at the time. Hence, the Court of Appeal held that the learned High Court Judge had erred in relying on *Nivesh*'s case to allow the appellant's claim for false imprisonment.

Whether The *Habeas Corpus* Decision Was Conclusive Evidence Of False Imprisonment?

[21] The learned High Court Judge had held that the *habeas corpus* decision was conclusive evidence of false imprisonment. In coming to this decision, the High Court had relied on the Court of Appeal case of *Shahrudi Abidin v. Datuk Wira Abu Seman Yusop Timbalan Menteri Dalam Negeri Kementerian Dalam Negeri Malaysia & Ors* [2021] 1 CLJ 52, and in particular the following passage:

> The respondents, by not appealing against the order made in the *habeas corpus* proceedings, must be taken to have accepted the findings of the court as correct and valid. In the circumstances, it was not open to the respondents to suggest that the *habeas corpus* proceedings were irrelevant and could not be accepted as evidence.

[22] The Court of Appeal, however, disagreed with this pronouncement of the High Court. In dealing with this issue, the Court of Appeal was of the view that in *Shahrudi*'s case, the court did not state that the failure to appeal against a *habeas corpus* decision can automatically be deemed as an admission of false imprisonment. The Court of Appeal, instead, found that a successful *habeas corpus* decision (even one which was not appealed against) is not conclusive evidence, but merely weighty evidence in a civil claim for damages. The success of a *habeas corpus* application does not *ipso facto* form the basis of a civil action for false imprisonment. This is borne out by the full *ratio decidendi* of the judgment in *Shahrudi*, the relevant parts of which read as follows:

> [20] Since the High Court which heard the *habeas corpus* proceedings order ruled that the restriction order was made without following the law and was therefore invalid, it only stands to reason that *habeas corpus* order is not just relevant and admissible but indeed provides compelling evidence as to the issue of whether the restraint was made with legal justification.

A [21] Any other conclusion, we say, would be akin to permitting a collateral attack on the earlier final decision of a court of competent jurisdiction. The implication, if we agree with the learned JC, is that the *habeas corpus* order could have been incorrectly decided. However, and this is highly significant, the respondents here did not appeal against the order made in the *habeas corpus* proceedings. They must then be taken to have
B accepted the findings of the court as correct and valid (see *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v. Ong San Huei* [2018] 3 CLJ 509; and *Penguasa Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v. Badrul Zaman PS Md Zakariah* [2014] 7 CLJ 533). In the circumstances, it is not open to the respondents here to suggest that the
C *habeas corpus* proceedings are irrelevant and cannot be accepted as evidence in the instant case.

[22] We must, however, hasten to add that the *habeas corpus* order is not conclusive in the instant proceedings but is only evidence which must be considered by the court. Put simply, it is not *res judicata* as the *habeas corpus* proceedings provided a different remedy compared to the instant
D proceedings. It is elementary that a person who claims to have been unlawfully imprisoned can either file *habeas corpus* proceedings which, if successful, will result in his immediate release or he can file a civil action for damages. It will not follow that success on the *habeas corpus* will form the basis of the civil action (see RJ Sharpe, *The Law of Habeas Corpus, Clarendon Press Oxford* (1976) at p. 59).

E [23] It is our judgment, however, that s. 43 of the Evidence Act 1950 was not envisaged for the kind of factual matrix as in the instant case. It was meant for the type of cases where a criminal conviction was being used for a subsequent civil proceeding as was the case in both *Hollington* and *Nallakaruppan*. *The upshot is that the habeas corpus proceedings and the habeas*
F *corpus order are not just relevant and admissible in the instant case but must also constitute, not conclusive evidence, but weighty evidence against the respondent such that failure to rebut must result in the success of the claim* (see *Stupple v. Royal Insurance Co Ltd* [1971] 1 QB 50). (emphasis added)

[23] Hence, the Court of Appeal held that the High Court had erred by
G relying on the mere fact that the *habeas corpus* decision was not appealed against or the fact that the *habeas corpus* order was granted to conclude that this was conclusive evidence of false imprisonment. The Court of Appeal further held that failure to appeal the *habeas corpus* order in itself cannot be construed as an admission or be the basis to make a finding of false
H imprisonment.

The Learned High Court Judge Had Erred In Applying A Restrictive Interpretation Of The Element Of 'Organised Violence'

[24] The Court of Appeal held that the learned High Court Judge had
I primarily relied on the *habeas corpus* decision, without examining the legal grounds or justification upon which the first defendant/respondent had applied for the remand under s. 4 of the POCA. In this regard, the court held that the learned High Court Judge had erred in applying a restrictive

interpretation in construing the term 'organised violence' in s. 4(1) of the POCA. The Court of Appeal was of the view that the term 'organised violence' under s. 4(1) of the POCA cannot be interpreted in a strict and literal manner. And in this regard, the court referred to the Federal Court decision in *Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals* [2021] 5 CLJ 581; [2021] 3 MLJ 759, where the words "organised violence against persons or property" in POCA were construed expansively, in the following terms:

> The meaning of 'organised violence against persons or property' must be assessed through the context and the entire scheme of the POCA. The words 'organised violence against persons or property' must not be interpreted restrictively as suggested. Unlawful gaming activity has evolved into a much more sophisticated illicit activity that even in this present day constitutes a threat to public order and safety.
>
> The intent of the POCA as expressed in the long title of the Act is for effectual prevention of crime throughout Malaysia and for the control of criminals, members of secret societies, terrorists and other undesirable persons, and for matters incidental thereto.
>
> So, to return to the central issue – whether the crime of unlawful gaming falls within the category of 'organised violence against persons or property'. The word 'organised' means 'arranged or planned well in the way mentioned'. As an adjective, it is 'involving large numbers of people who work together to do something in a way that has been carefully planned' (*Oxford Learner Dictionaries*).
>
> The word 'violence' literally means 'behaviour involving physical force that is intended to hurt, damage, or kill somebody or something'; physical or emotional force and energy; to damage something or have a bad effect on it (*Oxford Learner's Dictionaries*). 'Violence' has also been defined as consistent of a pattern of coercive behaviours used by a competent adult to establish and maintain power and control over about competent adult taking the form of physical and psychological damage to the person (*N Ozbaci and Z Erkan: Metaphors for Violence, Coll. Antropol.* 39 (2015) 1:193-201). In this light, it can be appreciated that there are two aspects to violence – physical and non-physical.
>
> In the context of the POCA 1959, the phrase 'organised violence against persons or property' must be juxtaposed with the meaning of the word 'unlawful gaming'.

[25] The Court of Appeal found that based on multiple police reports lodged by many complainants against the plaintiff/appellant, the first defendant/respondent had formed a reasonable believe that there were grounds to inquire into the allegations of organised violence perpetrated by the plaintiff/appellant to criminally extort the complainants for protection monies on account of fear of physical, financial, and reputational harm. The complainants were a class of citizens who were allegedly living in fear of the alleged criminal extortion pressed upon by the plaintiff. Thus, the first

defendant clearly had valid reasons and grounds to seek for the remand order under s. 4 of the POCA. Therefore, the Court of Appeal held that the learned High Court Judge had erred in finding that the remand was unlawful on this ground.

The Learned High Court Judge Had Erred In Failing To Appreciate That A Police Officer Carrying Out A Remand In Adherence To A Court Order Cannot Be Said To Have Falsely Imprisoned The Detenu

[26] The Court of Appeal held that the learned High Court Judge had erred in failing to appreciate that the first defendant/respondent, a police officer, carrying out a remand of a person in adherence to a court order cannot be said to have falsely imprisoned the detainee.

[27] The main ground that the *habeas corpus* court allowed the plaintiff's application was the error in the description of the place of remand entered in the impugned Magistrate's detention warrant. The error as to the location of the remand was on the impugned Magistrate's detention warrant, which was prepared and issued by the Magistrate and not the first defendant. Thus, the first defendant cannot be said to have falsely imprisoned the plaintiff as the first defendant was merely carrying out the remand in compliance to the order and warrant of the court.

[28] The Federal Court's decision in *Hassan Marsom & Ors v. Mohd Hady Ya'akop* [2018] 7 CLJ 403; [2018] 5 MLJ 141 was referred to by the Court of Appeal, where it was held that even if it can be proven that a police officer had maliciously or wrongfully applied and caused the court to issue a remand order, that police officer cannot be said to have falsely imprisoned the detainee as the police was only carrying out the order of the court. Instead of false imprisonment, the proper cause of action in such a case of wrongly or maliciously causing the issuance of the remand order is an action for malicious prosecution. However, in the present case, the plaintiff/respondent did not plead a claim for malicious prosecution.

The Learned Judge Had Erred In Finding That The 'Condition Of Detention' (Physical Abuse Allegations) Can Be A Ground For A Claim For False Imprisonment

[29] The Court of Appeal was of the view that physical abuse during detention cannot be the basis for a claim for false imprisonment nor did it negate the justifiability of the arresting officer's application and the Magistrate's issuance of the remand order or detention warrant. The proper cause of action for the abhorrent "condition of detention", including any physical abuse of the detainee, can only give rise to a claim for trespass against persons in assault, battery, and negligence but never for false imprisonment. In this regard, the Court of Appeal referred to its earlier decision in *Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nailathamby & Another Appeal* [2014] 9 CLJ 15; [2015] 1 MLJ 353, where the court held as follows:

[22] It is our respective view the abuses which the deceased endured do not and cannot give rise to a cause of action for false imprisonment. The cause of action for a tort of false imprisonment arises when a person has been imprisoned without lawful justification and that action is against the person who caused the imprisonment. Here the person who caused the detention is a magistrate exercising his judicial power and that judicial act had not been set aside or declared unlawful.

[23] In *R v. Deputy Governor of Parkhurst Prison, ex p Hague; Weldon v. Home Office* [1992] 1 AC 58 where a similar false imprisonment claim was made premised on the allegation that conditions of detention had become intolerable, the House of Lords held, *inter alia*, as follows:

> That although, where the conditions of detention of a prisoner were such as to be intolerable an otherwise lawful detention was not rendered unlawful, such conditions might give rise to public law remedy and, where prisoner suffered injury to health, a remedy in private law as well; such a remedy would lie in negligence rather than in false imprisonment.

Their Lordships also held that there must be a clear distinction between the 'nature of detention' and that of 'conditions of detention'. The nature of detention is a result of a judicial act and remains valid until set aside. The conditions of detention do not relate to 'nature of detention' and if such conditions become intolerable or illegal, they give rise not to the tort of unlawful detention.

[30] The Court of Appeal was of the view that, since the plaintiff had not pleaded a claim for tortious assault or battery, it is not open for the court at the late stage of appeal to determine and rule on the same. Thus, the Court of Appeal held that the learned High Court Judge had fallen into error in considering the alleged physical abuse of the plaintiff/appellant as the basis for a claim for false imprisonment.

[31] Please see *ASP Poonnam E Keling & Ors v. Sri Sanjeevan Ramakrishnan* [2023] 10 CLJ 1; [2023] 6 MLJ 651 for the Court of Appeal's full judgment.

Appeal To The Federal Court

[32] Aggrieved, the plaintiff/appellant filed an application for leave to appeal to the Federal Court. On 20 February 2024, the leave order was granted for the abovementioned question of law.

Issues Raised By The Appellant

[33] The main issue raised by the appellant for this court's consideration concerns the inter-relationship between *habeas corpus* proceedings, in particular where such proceedings result in an order favouring the release of a detenu, and a subsequent claim for damages for false imprisonment based on the same factual circumstances.

[34] The Federal Court in *Lei Meng v. Inspektor Wayandiana Abdullah & Ors And Other Appeals* [2022] 3 CLJ 177 made the following observation about the remedy of *habeas corpus* under art. 5(2) of the Federal Constitution:

> [75] In this jurisdiction, art. 5(2) FC makes express and mandatory provision for a court to inquire into a complaint of unlawful detention. As stated above, it then becomes incumbent upon the court to undertake an inquiry to satisfy itself that the detention is lawful. It is only if such satisfaction is met that the detention continues. Otherwise, the unlawfully detained person must be released.
>
> [76] It is therefore immediately apparent that the thrust of art. 5(2) FC is the right and entitlement to have a full enquiry into the detention claimed to be unlawful. *The remedy of release which we commonly refer to as habeas corpus, is a consequence or remedy consequent upon an inquiry mandatorily required under art. 5(2) FC, and only so available if the detention is found to be unlawful.* The jurisdiction of the High Court to grant a remedy of release or *habeas corpus* is therefore derived from art. 5(2) FC. (emphasis added)

[35] Thus, it is settled that an order of *habeas corpus* is only given when the detention is found to be unlawful. Now, if the *habeas corpus* court were to declare the detention unlawful and order the release of the detenu, does that automatically translate to an undefendable claim in an action for the tort of false imprisonment, bearing in mind that a claim for false imprisonment is a private law action and an application for a writ of *habeas corpus* is a public law proceeding?

[36] This is the crux of the matter in this appeal, and we shall answer that question with reference to the question of law posed for our consideration in this appeal. It must be noted that there are two parts to the said question of law; and they are where an order issuing the writ of *habeas corpus* is made in relation to the remand of a person:

(i) it is a necessary implication of such order that the detention was not effected in accordance with law under art. 5(2) of the Federal Constitution and was thus unlawful for contravening art. 5(1) of the Federal Constitution; and

(ii) whether that contravention amounts to false imprisonment for the purposes of a claim under tort.

[37] The first part of the question has been answered by this court in *Lei Meng*, where in paras. 75 and 76 of the judgment, the court held that the jurisdiction of the superior courts to grant a remedy of release or *habeas corpus* is derived from art. 5(2) of the Federal Constitution. When a complaint of unlawful detention is laid before the High Court, art. 5(2) requires the court to undertake an inquiry to satisfy itself that the detention is lawful. If the court determines the detention to be lawful, the detention continues; and if to the contrary the court determines the detention to be unlawful, then the detenu must be released by the issuance of a writ of *habeas corpus*. Accordingly, the court surmised as follows:

> [76] It is therefore immediately apparent that the thrust of art. 5(2) FC is the right and entitlement to have a full enquiry into the detention claimed to be unlawful. *The remedy of release which we commonly refer to as habeas corpus, is a consequence or remedy consequent upon an inquiry mandatorily required under art. 5(2) FC, and only so available if the detention is found to be unlawful* ... (emphasis added)

[38] Now, if the detention is held unlawful following an application for *habeas corpus* and the person is released pursuant to the dictates of art. 5(2), then, by necessary implication it would mean that there has been a breach of his constitutional right to liberty that is enshrined in art. 5(1) of the Federal Constitution that provides:

> No person shall be deprived of his life or personal liberty save in accordance with law.

However, whether that breach of constitutional right to liberty is actionable in tort, be it false imprisonment, malicious prosecution or breach of constitutional right, would have to be determined in accordance to the elements of the specific tort, as well as the facts and circumstances of the particular case.

[39] The procedure to apply for *habeas corpus* is governed under Chapter XXXVI of the Criminal Procedure Code, and in particular s. 365(a)(ii) thereof. Thus, the High Court would be exercising its criminal jurisdiction. There is a correlation between art. 5(2) of the Federal Constitution and s. 365(a)(ii) of the CPC. This relationship was noted by KC Vohrah J (as he then was) in *Sazali Mat Noh v. Timbalan Menteri Dalam Negeri, Malaysia* [1998] 4 CLJ 460; [1999] 1 MLJ 9:

> This provision is tied to art. 5(2) of the Federal Constitution and must be read together with s. 25(2) and para 1 of the Schedule to the Courts of Judicature Act 1964 and as modified by art. 162(6) of the Constitution. ... s. 365, as quoted, relates to a situation where a person is under detention and where it is alleged that the person is illegally or improperly detained in public or private custody within the limits of the Federation.

Section 365(a)(ii) of the CPC reads as follows:

> The High Court may whenever it thinks fit direct -
>
> (a) that any person who:
>
> (a) ...
>
> (b) is alleged to be illegally or improperly detained in public or private custody within the limits of Malaysia,
>
> be set at liberty;
>
> (b) ...

[40] Now, s. 365(a)(ii) of the CPC does not provide for the High Court to award damages or monetary compensation consequent to an order that the detenu be set at liberty in a *habeas corpus* application. The only order that the High Court can issue in a successful application for *habeas corpus* pursuant to s. 365(a)(ii) is to set at liberty the detenu. Hence, the need for the person so released to file a separate action in tort to claim damages. In *Hassan Marsom* (*supra*), the Federal Court noted the two distinct and separate modes available to a detenu who claims unlawful detention:

> In law, he has a choice either to pursue his cause either by way of the procedures provided under Chapter XXXI of the CPC or by the very action he undertook in this case. He must be allowed to have the choice of bringing an action in a civil court as an alternative to the procedures provided under Chapter XXXI of the CPC.

This was also noted by the Court of Appeal in *Shahrudi Abidin v. Datuk Wira Abu Seman Yusop Timbalan Menteri Dalam Negeri Kementerian Dalam Negeri Malaysia & Ors* [2021] 1 CLJ 52, where in a claim for damages for false imprisonment, the court noted that:

> [22] We must, however, hasten to add that the *habeas corpu*s order is not conclusive in the instant proceedings but is only evidence which must be considered by the court. Put simply, it is not *res judicata* as the *habeas corpus proceedings provided a different remedy compared to the instant proceedings, it is elementary that a person who claims to have been unlawfully imprisoned can either file habeas corpus proceedings which, if successful, will result in his immediate release or he can file a civil action for damages. It will not follow that success on the habeas corpus will form the basis of the civil action* (see RJ Sharpe, *The Law of Habeas Corpus*, Clarendon Press Oxford (1976) at p. 59). (emphasis added)

[41] We agree with the above *dicta* of the Court of Appeal in *Shahrudi*, and adopt the same. The detenu who claims to have been unlawfully detained and is successful in a claim for *habeas corpus* will have to mount a separate action in tort for damages or monetary compensation. The success on a *habeas corpus* application will not necessarily form the basis of the civil action for damages.

[42] The cause of action for a tort of false imprisonment arises when a person has been imprisoned without lawful justification or just cause and that action is against the person who caused the imprisonment. And the law is well-settled, in that, to establish a claim for the tort of false imprisonment, the claimant must prove:

(i) the fact of imprisonment; and

(ii) the absence of lawful authority to justify that imprisonment.

[43] The law on this is well-settled, as was stated by the Court of Appeal in *Shahrudi*'s case:

> [25] Coming now to the instant claim, the law on false imprisonment is settled in that once a plaintiff establishes the imprisonment, the burden of proving justification lies with defendant (see *Hicks v. Faulkner* (1878) 8 QBD 167 at p. 170). As stated by Lord Atkin in *Liversidge v. Anderson* [1942] AC 206 at p. 245 (dissenting): "one of the pillars of liberty is that in English law, every imprisonment is *prima facie* unlawful and that it is for the person directing the imprisonment to justify his act", (as observed in Judith Farbey, RJ Sharpe and Simon Atrill, *The Law of Habeas Corpus* (3rd edn) Oxford (2011) at p. 88).
>
> ...
>
> [28] As mentioned earlier, it was for the respondents to establish that they had acted in accordance with the law. ...

[44] Thus, in a tortious claim for false imprisonment, the law affords the defendant the opportunity to raise a defence to the claim and establish that he had acted in accordance with the law or in other words, that there was justification for the detention. The defendants would have the right to establish their pleaded defence. Hence, whilst the order of *habeas corpus* is strong evidence in favour of the plaintiff, it is not conclusive to establish the case for false imprisonment. The fact that a *habeas corpus* order was issued does not automatically translate to liability for false imprisonment.

[45] Learned counsel for the appellant submitted that the question of justifying the detention does not arise. Counsel argued that if the detention is found to have been unlawful within the meaning of art. 5(2) of the Federal Constitution, such that a writ of *habeas corpus* is issued, it is of no consequence that the detention was effected in good faith. We are disinclined to accept this argument for the following reasons.

[46] The tort of false imprisonment is not one of strict liability that necessarily flows from an order of *habeas corpus* as contended by learned counsel. Here, there are two different processes under the law, and they are: (i) *habeas corpus* under criminal law, and (ii) tort of false imprisonment under civil law. Generally, both deal with lawfulness of detention, but between both, there are different constituent elements that must be established and different remedies that may be granted by the court. The success of one, does not invariably lead to the success of the other.

[47] The High Court in *Balakrishnan Subramaniam v. Penguasa Pusat Pemulihan Akhlak, Simpang Renggam, Johor Darul Takzim & Ors* [2014] 2 CLJ 563 had the occasion to consider this issue and held as follows, which we fully endorse:

> [38] The proceedings in the *habeas corpus* ought to be distinguished from the writ action for common law tort of false imprisonment such as the case at hand. In a *habeas corpus*, the challenge was only in respect of procedural non-compliance by the detaining authority whereas in an action under the common law tort of false imprisonment, the plaintiff would have to show absence or excess of jurisdiction on the part of the

defendants. The remedy in a *habeas corpus* is the immediate release of the *corpus* from a restraint. This principle had been well illustrated by RJ Sharpe in the learned author's book entitled *The Law of Habeas Corpus* as follows:

> False imprisonment is not a remedy which takes the place of *habeas corpus* as it will not ordinarily be used to obtain immediate release from a restraint, but it does afford one means of redress for anyone who has been unlawfully imprisoned. The civil action in damages will only succeed where there has been absence or excess of jurisdiction. Moreover, it by no means follows that success on *habeas corpus*, even on the grounds of jurisdictional error will afford the basis for an action in false imprisonment. The matter is not *res judicata* ...

> [39] Hence the fact that a *habeas corpus* had been issued by the High Court would not grant an automatic right to the plaintiff to damages as claimed herein. In the common law tort of false imprisonment, the plaintiff still had the evidentiary burden to prove that his detention was unlawful and for this court to decide on the issue of liability first before making the award for damages as prayed. The plaintiff has a duty to prove his case on the balance of probabilities that he was unlawfully arrested and/or detained, demonstrating that there was absence or excess of jurisdiction on the part of the defendants.

[48] Similarly, the Court of Appeal in this instant case, after having referred to its earlier decision in *Shahrudi*, had expressed the same view, which we accept as the correct proposition of the law:

> [19] As astutely explained by the Court of Appeal in *Shahrudi*, the nature of false imprisonment as remedy is starkly different from the nature of *habeas corpus.* A *habeas corpus* as remedy can be applied for and be allowed by the court to free a detainee if there were matters both technical and substantive which would entitle the detainee to be immediately released. On the other hand, the tort of false imprisonment transcends beyond mere technicalities and encroaches the issue on the justifiability of the detention itself.

> [20] Thus, even if we are bound to accept the *habeas corpus* decision, the same decision is hardly conclusive evidence to establish a case for false imprisonment. It still remains solely incumbent upon the plaintiff to prove that the detention or imprisonment of the plaintiff was without any legal or just grounds. It is sorely insufficient for the plaintiff to merely rely on the technical grounds of the *habeas corpus* decision to ultimately prove a case for false imprisonment. The impugned magistrate's warrant might be in error, but the error does not at all diminish or negate the first defendant's legal justification to detain the plaintiff under s. 4(1) of the POCA.

[49] The Federal Court in *Hassan Marsom & Ors v. Mohd Hady Ya'akop* (*supra*) in dealing with the issue of whether damages for false imprisonment can be awarded for detention under an order of the Magistrate under s. 117

of the Criminal Procedure Code, held that since the respondent was remanded under a judicial order of a Magistrate, it could not be false imprisonment. The remand order might have been wrongly applied. It might even have been that there was no reasonable cause or basis for a remand order. The remand order might have been applied and/or issued without compliance with s. 117 of the CPC. The remand order might even have been set aside. However, that was all inconsequential in a claim for false imprisonment. Rather than false imprisonment, if at all, it was malicious prosecution.

[50] The law is well-settled in that once a judicial act interposes, liability for false imprisonment ceases on the part of the person who takes proceedings before a Magistrate or judge to obtain a judicial order of detention. This is also the position in England. In *Halsbury's Laws of England* (5th edn, vol. 97) at para. 544, it is stated:

> No claim for false imprisonment otherwise lies against a person who takes proceedings before a magistrate or judge in respect of imprisonment which is caused by the order of the magistrate or judge; the remedy, if any, of the person imprisoned in such a case, is a claim for malicious prosecution against the person who instituted the proceedings.

Similarly, in the leading text, *The Law of Torts* by Fleming, it is observed at p. 38:

> A person who brings about an arrest by merely setting in motion the formal process of law, as by making a complaint before a justice of the peace or applying a warrant is not liable for false imprisonment because courts of justice are not agents of the prosecutor and their acts are not imputable to him. He is liable, if at all, only for the misuse of legal process by procuring an arrest for an improper purpose for which the appropriate remedy is an action for malicious prosecution. This rule provides a valuable protection against liability for error in the course of legal proceedings.

Further, in *Civil Actions against the Police* by Richard Clayton and Hugh Tomlinson at p. 116, the learned authors state the law as follows:

> ... where an imprisonment is effected through judicial proceedings, liability for false imprisonment virtually disappears', on account of the following *dicta* of Willes J in *Austin v. Dowling* (1870) LR 5 CP 534 at p 540:
>
> > The distinction between false imprisonment and malicious prosecution is well illustrated by the case where the parties being before a magistrate, one makes a false charge against another, whereupon the magistrate orders the person to be charged and taken into custody until the matter is investigated. The person making the charge is not liable for the action because he does not set a ministerial officer in motion but a judicial officer is interposed between the charge and the imprisonment.

A And in another leading text, *Salmond & Heuston on the Law of Torts* 21st edn, at pp. 126 to 127, the principle was stated as follows:

> *No action for false imprisonment will lie against a person who has procured the imprisonment of another by obtaining against him a judgment or other judicial order of a court of justice even though that judgment or order is erroneous, irregular, or*
B *without jurisdiction.* The proper remedy in such a case is an action for malicious prosecution or other malicious abuse of legal process. In an action of that description that plaintiff can succeed only if he proves both malice and the absence of any reasonable and probable cause for the proceedings complained of; whereas in an action for false imprisonment, just as in all other cases of trespass to person or property, liability is
C created, in general, even by honest and inevitable mistake. The rule, therefore, that no action for false imprisonment will lie against a litigant in respect of judicial imprisonment procured by him is a valuable protection against liability for error in the course of legal proceedings. Accordingly, if the plaintiff has been wrongly arrested without warrant and taken before a magistrate, who remands him in custody, he must sue
D in respect of his imprisonment before the remand in an action for false imprisonment, but in respect of that which is subsequent to the remand in an action for malicious prosecution. The reason for this distinction is that *a man cannot be sued in trespass (and so not for false imprisonment) unless he himself, whether personally or by his agent, has done the act complained of. A court of justice, however, is not the agent of the litigant but acts in the exercise of its*
E *own independent judicial discretion.* The litigant can be charged only with having maliciously and without reasonable cause exercised his rights of setting a court of justice in motion. *This exemption of the litigant from any liability for false imprisonment extends even to cases in which the court ordering the imprisonment has acted without jurisdiction.* It is the right of every litigant to
F bring his case before the court, and it is for the court to know the limits of its own jurisdiction and to keep within them. (emphasis added)

[51] The above statements of the law on false imprisonment were referred to with approval by the Federal Court in *Hassan Marsom*, where the court noted that the common law rule stated in *Austin v. Dowling* [1870] LR 5 CP
G 534 (*supra*) is still good law (see *Zenati v. Commissioner Of Police Of The Metropolis And Another* [2015] 2 WLR 1563 at 1580; *Coghlan v. Chief Constable Of Cheshire Police And Others* [2018] EWHC 34 (QB)). The Federal Court in *Hassan Marsom* concluded:

> [141] In short, a judicial order provides the defence of lawful authority for
H the detention or imprisonment (see *Hepple and Matthews' Tort Law: Cases and Materials* by David Howarth, Martin Matthews, Jonathan Morgan, Janet O'Sullivan, Stelios Tofaris (2016 Publication) at p. 750).
>
> [142] In the instant case, the respondent was remanded under the judicial order of a magistrate. The remand order might have been wrongly applied.
I It might even have been that there was no reasonable cause or basis for a remand order. The remand order might have been applied and or issued

> without compliance with s. 117 of the Criminal Procedure Code. The remand order might even have been set aside. But that, with respect, was all inconsequential in a claim for false imprisonment, ...
>
> ...
>
> [151] What was only pertinent was whether the respondent was remanded under lawful authority at the material time of the remand. Since the respondent was remanded under a judicial order, it could not be false imprisonment.

[52] We do not see any reason to depart from this well-established principle. And for these reasons, we affirm the concluding findings of the Court of Appeal in this case at para. 25 of the grounds of judgment:

> [25] ... it must be emphasized that the sole ground that the *habeas corpus* court allowed the plaintiff's application was not at all the technical error committed by the first defendant. The error as to the location of the remand was on the impugned magistrate's warrant which was prepared and issued by the magistrate (not the first defendant). Thus, in actuality the first defendant cannot be said to have falsely imprisoned the plaintiff as the first defendant was merely carrying out the arrest and remand in due compliance of the order and warrant of the court.

The plaintiff/appellant's detention was based on the Magistrate's detention warrant. Hence, the detention was not made in the absence of a lawful judicial order or in excess of jurisdiction. The first defendant was merely executing the judicial order contained in the Magistrate's detention warrant. The fact that the first defendant laid the complaint before the Magistrate is irrelevant in a claim for false imprisonment. The application for *habeas corpus* was allowed on a technicality, *ie*, that the place of detention stated in the detention warrant was not a gazetted place of detention. That mistake cannot be attributed to the first defendant. Thus, the first respondent cannot be held liable in an action for false imprisonment, nor would the second and third respondents be vicariously liable in the absence of liability on the part of the alleged primary tortfeasor.

Answer To The Leave Question

[53] For the reasons stated above, our answer to the leave question is in the negative.

Conclusion

[54] In the premise of the foregoing, the appeal is dismissed and the judgment and order of the Court of Appeal is affirmed.